

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAMES KIMBLE,

Defendant-Appellant.

UNPUBLISHED

August 14, 2003

No. 239273

Kalamazoo Circuit Court

LC No. 01-000353-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to five to thirty years' imprisonment on the first-degree criminal sexual conduct convictions, and five to fifteen years' imprisonment on the second-degree criminal sexual conduct convictions. We affirm.

This appeal arises out of four specific incidents of sexual abuse that took place between approximately July and November 1998, when the victim was eleven years old. The victim did not report the alleged abuse to her mother until June 2000.

I. Prosecutorial Misconduct

Defendant first argues that he was denied the right to a fair and impartial trial because the prosecutor improperly vouched for the victim's credibility, asked the jury to refrain from judging the victim's credibility, and injected issues into trial that were broader than defendant's guilt or innocence by commenting that a witness was a "good civic citizen." We disagree.

Where appellate review of allegedly improper conduct by the prosecutor has been precluded because the defendant has failed to timely and specifically object, this Court will only review the defendant's claim for plain error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). In the present case, defendant failed to make a specific and timely objection; therefore, defendant's claim is reviewed for plain error. To avoid forfeiture under the plain error rule, defendant must prove that (1) error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected the defendant's substantial rights, i.e., affected the outcome of the trial proceedings. *Carines, supra* at 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, reversal is warranted only when a plain error resulted in the conviction of an

actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

“We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The prosecution may argue a witness’ credibility based on the evidence presented at trial. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). “A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully.” *Id.*

Reviewing the prosecutor’s comments in context reveals that the prosecutor was properly commenting on the victim’s credibility based on the evidence presented, and not asserting her personal belief regarding the victim’s credibility. First, the prosecutor asked the jury to decide the facts and to assess the witnesses’ credibility, stating that “your role as the fact finders in this particular case and assessing credibility is about to begin.” Second, the prosecutor continued by stating that there was no evidence presented that would indicate a reason for the victim to lie, and that defendant himself could not articulate a reason why the victim would “make the story up.” The prosecutor even acknowledged and commented on the inconsistencies in the victim’s testimony, asking the jury to consider her young age as a reason for these inconsistencies and reminding the jury that the victim did recall specific details of the events in question. Thus, reviewing the prosecutor’s comments in context, she was not improperly vouching for the victim’s credibility.

The prosecutor’s comment that the jury could not “sit in judgment upon [the victim]” was also appropriate when reviewed in context. The prosecutor merely asked the jury not to place too much emphasis on why the victim had waited so long to come forward and why she voluntarily maintained a relationship with defendant after she moved out of his house. The prosecutor did not direct the jury to refrain from judging the victim’s credibility.

Next, defendant argues that the prosecutor improperly commented on a witness’ testimony by stating the following:

So what did we learn about this good civic citizen Tony Hofacker who sits here today in court. He told [the victim’s mother] to keep [the victim] away from the defendant. Good civic duty, responsibility. He comes into court and he testifies, you know, honestly, forthrightly. And then on cross-examination, isn’t it true you told [the victim’s mother] after the breakup to stay away? Well, yeah, we appreciate that good civic responsibility.

Defendant asserts, citing *People v Ralph Williams*, 179 Mich App 15, 18; 445 NW2d 170 (1989), rev’d on other grounds 434 Mich 894 (1990), that a prosecutor may not inject issues broader than the defendant’s guilt or innocence into trial. Defendant’s argument is flawed because the *Ralph Williams* ruling is inapplicable to the present case. In *Ralph Williams*, the prosecutor improperly made several comments to the jury regarding *the jury’s* civic duty to allow “good” to triumph over “evil.” *Id.*

“Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant’s guilt or innocence of the charges and because they encourage

jurors to suspend their own powers of judgment.” *Id.* However, a prosecutor may argue the evidence and all reasonable inferences arising from the evidence as it relates to the prosecution’s theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Here, the prosecutor did not make any reference to the jury’s “civic duty” to reach the “right” result and return a guilty verdict. Instead, this was a proper argument drawing a reasonable inference from the evidence: that the witness told the victim’s mother to keep the victim away from defendant because he felt that it was his responsibility to warn her.

II. Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to interview certain witnesses before trial and to call certain witnesses during trial, failed to properly investigate the charges against defendant, failed to present evidence of an alibi for at least one of the charges, and failed to object to prosecutorial misconduct. We disagree.

This issue is not preserved for appellate review because defendant failed to move for a new trial or a *Ginther*¹ hearing before the trial court. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is a plain error affecting a defendant’s substantial rights. *Carines, supra* at 763-764. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent from the existing record. *Snider, supra* at 423.

In order to establish ineffective assistance of counsel, a defendant must demonstrate (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). “‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citation omitted). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant makes six specific arguments regarding how his trial counsel was deficient; however, only one of these arguments, that trial counsel failed to object to alleged prosecutorial misconduct, is apparent from the lower court record. The details of the remaining five allegations are not apparent from the lower court record and thus, these errors are forfeited. *Snider, supra* at 423.² In so concluding, we note that whether to call witnesses at trial is a matter of trial strategy. *Rockey, supra* at 76.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² Although defendant requests remand for a *Ginther* hearing, defendant has not provided any evidence to suggest what might be established at the hearing. Instead, he has merely made unsupported assertions as to what counsel failed to do, which is insufficient to obtain a remand.

(continued...)

With regard to defendant's claim that trial counsel was ineffective for failing to object to the prosecutor's remarks, we note that none of the remarks were improper and that any objection would have been futile. An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

III. Evidentiary Issues

Defendant next contends that the trial court abused its discretion by refusing to admit evidence of the victim's mother's prior false allegation of sexual abuse. According to defendant, this evidence was relevant because it directly related to the mother's credibility, which was an issue of consequence at trial, and because the probative value of the evidence outweighed any of its prejudicial effects. We disagree.

The decision to admit or deny evidence is within the sound discretion of the trial court, and will be reviewed only for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion is found only if, considering the facts on which the trial court acted, an unprejudiced person would find that there was no justification or excuse for the ruling made. *Snider, supra* at 419.

The trial court did not abuse its discretion by excluding evidence of the mother's allegedly false prior allegation of sexual abuse. First, defendant did not offer any evidence to establish that the victim or her mother had made a prior false accusation of sexual abuse. See *People v Dale Williams*, 191 Mich App 269, 273-274; 477 NW2d 877 (1991). Second, MRE 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." Even if relevant, evidence may be excluded under MRE 403, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

Here, the testimony was not relevant under MRE 401, for purposes of the mother's credibility, because there was no evidence that the mother's prior suspicions that the victim had been sexually abused when she was a baby were actually false, nor was there any evidence that the mother invented those prior allegations in order to retain custody of the victim. Thus, the testimony would have offered little or no information to the jury regarding the credibility of victim or her mother. Furthermore, the testimony did not tend to prove the fact in support of which it was offered, which was that the mother made prior false allegations of child abuse at a time when it benefited her to do so (during the custody hearings) and, thus, was likely to do it again.

Additionally, any probative value that the evidence offered was outweighed by its prejudicial effects. MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified on other

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MCR 7.211(C)(1)(a)(ii).

grounds 450 Mich 1212 (1995). In the instant case, there was a danger that the jury might conclude that the prior allegation was false simply because it was never substantiated. Thus, there was a great possibility that the testimony would mislead and confuse the jury, and as a result, the jury would likely give the testimony undue weight. Accordingly, the trial court did not abuse its discretion in refusing to admit the testimony.

Finally, defendant argues that the trial court abused its discretion in admitting “other acts” evidence of uncharged offenses where defendant allegedly touched the victim’s breasts in a sexually inappropriate manner approximately three times a week. According to defendant, the evidence was irrelevant to any material issue at trial, and it served no purpose other than to prove that defendant had a propensity for committing “bad acts” and was more likely to have committed the charged offenses. Defendant claims that the “innumerable” times that these “other acts” occurred highly prejudiced defendant because such evidence confused and misled the jury. We disagree.

MRE 404(b) states that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court held that evidence of “other acts” is admissible if (1) it is relevant; (2) it is offered for a proper purpose (not to prove that the defendant acted in conformity with his character); (3) the probative value is not substantially outweighed by undue prejudice; and (4) upon request, the trial court provides a limiting instruction. MRE 404(b) is rule of inclusion, not exclusion, meaning that the proper purposes listed for admission under MRE 404(b) are not exhaustive, but rather examples of some appropriate purposes. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

Here, the trial court correctly evaluated the relevancy of the contested evidence and properly applied the balancing test required by MRE 403, citing *People v DerMartex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973). In *DerMartex*, the defendant was convicted of assault with the intent to commit rape of a ten-year-old girl. *Id.* at 412. The defendant argued that the trial court erred in allowing the girl’s testimony regarding other incidents, aside from the charged offense, where the defendant “sexually mistreated her,” and that he did so “often.” *Id.* at 412-413. Our Supreme Court found that the probative value of such testimony outweighs its prejudicial effects where the “crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense.” *Id.* at 413. The Court held that allowing the admission of such evidence was “especially justified” where the sexual offense was being charged against a member of the victim’s household, because otherwise, the testimony of the victim concerning the “seemingly isolated” events may seem “incredible.” *Id.* at 415.

The present case is similar to *DerMartex* because here, defendant was being charged with crimes of a sexual nature against someone living in his household; the evidence of the other incidents where defendant touched the victim’s breasts in a sexually inappropriate manner approximately three times a week tends to demonstrate the “similar familiarity between the defendant” and the victim; and the evidence makes the victim’s allegations of the charged offenses more credible, as it demonstrates that they were not isolated events. The trial court correctly followed the criteria for admitting “other acts” evidence as articulated in *VanderVliet*,

supra at 74-75, and found that the evidence was relevant and offered for a proper purpose based on *DerMartzex*.

The trial court further found that the probative value of the evidence was not substantially outweighed by unfair prejudice to defendant. The evidence of defendant's prior acts of sexual misconduct were highly probative of his fascination with the victim, as it placed the charged offenses in context, explained why the victim could not "pinpoint" the exact dates and circumstances surrounding the incidents, and was probative of defendant's state of mind, which was in issue at trial. The danger of unfair prejudice and risk of confusion was not great because the evidence actually served to help the jury envision a complete picture of the events surrounding the charged offenses. Finally, the trial court gave the jury a limiting instruction urging the jury not to consider this evidence for any improper purpose, such as finding that defendant was a "bad person," or that he was more likely to commit the charged offenses. Therefore, because the evidence was relevant, offered for a proper purpose, and its probative value was not substantially outweighed by unfair prejudice, the trial court did not abuse its discretion in admitting the contested evidence.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray